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IN THE

Supreme Court of the United States

Nos. 2, 3 and 4, Original

OCTOBER TERM, A. D. 1956

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA, *Complainants,* vs. STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 2 Original
STATE OF MICHIGAN, *Complainant,* vs. STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO, et al., *Defendants.*	No. 3 Original
STATE OF NEW YORK, *Complainant,* vs. STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO, et al., *Defendants.*	No. 4 Original

MOTION OF THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO (FORMERLY THE SANITARY DISTRICT OF CHICAGO) TO THE SUPREME COURT OF THE UNITED STATES FOR CLARIFICATION OF THE DECREE OF APRIL 21, 1930, AND ANSWER TO PETITION OF STATE OF ILLINOIS FOR MODIFICATION OF PARAGRAPH 3 OF SAID DECREE.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The Metropolitan Sanitary District of Greater Chicago (formerly The Sanitary District of Chicago), a Municipal

Corporation, a party defendant in the above entitled Original causes, presents this Motion to the Court for a clarification of its decree of April 21, 1930.

This clarification is requested whereby the Congress, acting through its agencies, the Secretary of the Army upon recommendation of the Chief of Engineers, in the interest of navigation, may be authorized to direct The Metropolitan Sanitary District of Greater Chicago to temporarily divert, for a period of 100 days, or for such other period of time as may be required, 10,000 cubic feet of water per second (c.f.s.) at Chicago from Lake Michigan to the Illinois Waterway and the Mississippi River, so as to ameliorate present serious navigation conditions existing in said waterways.

This action is required because of unprecedented drought conditions in the area resulting in critical emergency conditions presently existing upon the Illinois and Mississippi Rivers whereby the health of many riparian cities and smaller communities upon the said waterways is endangered due to extreme difficulties being experienced in their water supply; commercial navigation on the rivers has been seriously impaired and grave harm to the national welfare is threatened; all as more specifically detailed in the *Petition For Temporary Modification of Paragraph 3 of Decree of April 21, 1930*, as heretofore filed in this Court by the State of Illinois.

The Governor of Illinois on October 16, 1956, petitioned the Secretary of Defense for an increase of diversion of water from Lake Michigan to meet the crisis and to relieve this critical emergency on the waterways. This Petition by the Governor of Illinois was rejected by the Honorable Wilber M. Brucker, Secretary of the Army, who stated:

> "With respect to increasing diversion of Great Lakes waters, such diversion is now restricted to an annual

average of 1,500 second feet plus domestic pumpage pursuant to a decree of the Supreme Court of the United States dated 21 April 1930 (281 U. S. 696). The Court retained jurisdiction 'for the purpose of any orders or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.'

Accordingly, no authority is known to exist under which any change in the diversion of water from Lake Michigan could be permitted by this Department contrary to the restrictions imposed by the Supreme Court."

Thereupon the State of Illinois, through its Attorney General, presented its "Petition For Temporary Modification of Paragraph 3 of Decree of April 21, 1930."

The Metropolitan Sanitary District of Greater Chicago considers that the Secretary of the Army misconstrued the Decree of this Court of April 21, 1930, in so advising the Governor of Illinois as to the purported restrictions of the Decree, and considers that it is unnecessary to secure a Modification of the Decree, but that a *Motion* to immediately *clarify* the decree, in lieu of a *Modification* thereof, is proper and desirable.

The Metropolitan Sanitary District of Greater Chicago considers that it was not the intention of this Court, in its opinion of April 14, 1930, (preceding the actual decree of April 21, 1930) 281 U. S. 179, 74 Law Ed. 799, or by its decree of April 21, 1930, (following the Opinion of April 14, 1930) 281 U. S. 696, 74 Law Ed. 1123, to deprive the Congress or its deputies of the power to determine the amounts of diversion required for actual navigation purposes, such as presently involved, and therefore respectfully presents this Motion for a clarification of its decree of April 21, 1930, accordingly, so as to provide that the Congress, acting upon the expert recommendations of its depu-

ties (the Corps of Engineers and the Secretary of the Army) may now promptly determine and authorize the amount of diversion required for actual navigation purposes in the present instance.

SUMMARY OF ORIGINAL ACTIONS AND DECREES.

These Original Actions were instituted by certain Great Lakes States to prevent the State of Illinois and The Sanitary District of Chicago from diverting water from Lake Michigan for the purpose of diluting and carrying away the sewage of Chicago and the surrounding metropolitan area.

The facts were as detailed in, and the controlling law governing both the facts and the law was established by the decision of this Court of January 14, 1929, reported in *Wisconsin, et al.* v. *Illinois, et al.*, 278 U. S. 367, 73 Law Ed. page 426.

In January 1925, in the case of *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 69 Law Ed. 352, this Court decreed that The Sanitary District of Chicago should be enjoined from diverting in excess of 250,000 cubic feet per minute (4,167 c.f.s.) from Lake Michigan, to go into effect in 60 days, "without prejudice to any permit that might be issued by the Secretary of War according to law."

Immediately after the foregoing decision of January 1925, the Sanitary District applied to the Secretary of War for a permit to divert more than the 4,167 c.f.s. specified in that decree. On March 3, 1925, the Secretary of War issued a permit to the Sanitary District authorizing an annual average diversion of 8,500 cubic feet per second from Lake Michigan with an "instantaneous" maximum not to exceed 11,000 c.f.s., upon conditions requiring the installation of artificial treatment of one-third of Chicago's popu-

lation sewage within a designated period. The Sanitary District complied with these requirements.

The permit of March 3, 1925, certified that the foregoing diversion was made by the Secretary of War upon the recommendation of the Chief of Engineers, under *Paragraph 10 of the Act of March 3, 1899, Chap. 425, 30 Stat. at L. 1151, U. S. C. title 33, par. 403.*

This Court in its Opinion (1929) in *Wisconsin, et al.* v. *Illinois, et al., 278 U. S. 367*, recognized that the Congress had the right, in the interest of navigation, to authorize a diversion from Lake Michigan at Chicago, and the Congress could vest the determination as to the amount of such diversion in the Secretary of War upon recommendation of its Chief of Engineers. This Court held such action would not be invalid as being a delegation by Congress of its legislative power.

The Court held:

> "The determination of the amount that could be safely taken from the lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress * * * (Citing numerous authorities) * * *"

Wisconsin, et al. v. *Illinois, et al.*, 278 U. S. 367, 73 Law Ed. p. 426 at 433.

The Court in the above Opinion (1929), held, however, that as the permit of March 3, 1925, of the Secretary of War was based upon *sanitation* and not *navigation* purposes, it was outside of the limited scope of the Secretary's authority. The Court likewise held that as the Congress had not then directly authorized a waterway from Lake Michigan to the Mississippi River, a diversion for such a waterway was not to be considered, and *only the diversion necessary for the purpose of maintaining navigation in the*

Chicago River, as a part of the Port of Chicago, should be considered. The Court then directed that the matter be again referred to Special Master Charles Evans Hughes to take further testimony as to the time required for Chicago to complete the necessary artificial sewage treatment facilities and to determine the time for the gradual reductions in diversion of water from Lake Michigan, pending the completion of such works, *such diversion to be necessary for navigation in the Chicago River as a part of the Port of Chicago.*

Special Master Hughes made his Report on Re-Reference, as ordered by the Court, on December 17, 1929, as to the amount of water to be eventually necessary by diversion from Lake Michigan, "for the purpose of maintaining navigation in the Chicago River, as a part of the Port of Chicago." *The needs of diversion, if any, for the Illinois Waterway were not considered by Special Master Hughes, as it was not then a federal project authorized by the Congress.*

Special Master Hughes recommended a gradual diminution of diversion from Lake Michigan, geared to the time for completion of certain works by The Sanitary District of Chicago, as follows: an annual average of 6,500 c.f.s. after July 1, 1930; annual average of 5,000 c.f.s. after December 31, 1935, and, an annual average of 1,500 c.f.s. after December 31, 1938, said amounts to be in addition to domestic pumpage.

The Supreme Court in the Opinion of April 14, 1930, *Wisconsin, et al.* v. *Illinois, et al.*, 281 U. S. 179, 74 Law Ed. 799, concurred in the recommendations of Special Master Hughes and directed that a decree be accordingly entered. On April 21, 1930, the decree was entered in *Wisconsin, et al.* v. *Illinois, et al.*, 281 U. S. 696, 74 Law Ed. 1123, pursuant to the Opinion of April 14, 1930.

SUBSEQUENT EVENTS EFFECTING DIVERSION SINCE ENTRY OF DECREE OF APRIL 21, 1930.

On June 26, 1930, the Secretary of War, issued a permit to The Sanitary District of Chicago to divert water from Lake Michigan at Chicago, in the annual average amounts specified in the decree of the Supreme Court of April 21, 1930, in addition to domestic pumpage.

This permit is being and has been followed by The Metropolitan Sanitary District of Greater Chicago, as the legal successor to The Sanitary District of Chicago.

On July 3, 1930, the Congress passed the Rivers and Harbors Act of 1930, under which $7,500,000.00 was appropriated to complete the Illinois Waterway, and the project was taken over by the Federal Government as an authorized navigation project. It was completed by the Army Engineers at Government expense and officially opened June 22, 1933. The Rivers and Harbors Act of 1930, provided that the water authorized to be diverted from Lake Michigan by the decree of April 21, 1930, of the Supreme Court "is hereby authorized to be used for navigation of said waterway." The Congress further directed that subsequent studies be made by the Secretary of the Army as to the minimum amount of flow required to meet the needs of the waterway.

PRIOR TEMPORARY INCREASED DIVERSIONS FOR NAVIGATION.

There have been three occasions since April 21, 1930 when abnormal drafts of water have been required from Lake Michigan to aid navigation in the Illinois and Mississippi Rivers. These were August 14 to September 18, 1930 (9,030 cubic feet per second); July 8 to August 7, 1936

(increase of 1,500 cfs over existing diversion); and January 25-27, 1944 (increase from 1,450 cfs to 5,000 cfs).

The increase in 1930 was due to low water in the Illinois River. The authorized diversion then was 6,500 cfs. The increase in 1936 was due to low water in the Mississippi River above the mouth of the Illinois. Greater depth was needed there to move certain boats during the construction of some of the locks and dams in the Mississippi. The authorized diversion at that time was 5,000 cfs, annual average. Both of the foregoing increases were before the complete canalization of the Illinois and upper Mississippi Rivers.

The increase in January 1944, from a budgeted diversion of 1,450 cubic feet per second to 5,000 cfs planned for twenty days, was to provide greater water depth in the Mississippi River at Chain of Rocks, to permit the passage of Naval craft to the Gulf of Mexico. The maintenance of sufficient depth at this place during a period of prolonged drought, September 1943 to January 1944, had used all the water available in the Mississippi River reservoirs and in the Fort Peck reservoir of the Missouri. It became necessary, in the words of the Acting Secretary of the Navy, in order *"to continue the promotion of the war effort,"* confirmed by the Secretary of War, to draw on "the only other source, Lake Michigan via the Chicago Sanitary and Ship Canal and the Illinois Waterway," to obtain the required 9 feet of draft. After this increase in diversion had been in effect for two days, a general rain fell over the upper Mississippi River basin and immediately relieved the situation.

The increased diversion, in effect on each of the above three occasions mentioned, was offset by reduced diversions later by the Sanitary District, to bring the annual average diversion within the authorized limits, at the times, as specified in the Supreme Court Decree of April 21, 1930.

PRESENT CRITICAL CONDITIONS IN MISSISSIPPI AND ILLINOIS WATERWAYS.

Because of the prolonged drought in the areas tributary to the Missouri, Upper Mississippi and Illinois Rivers, as reported by Colonel George E. White, Jr., District Engineer, Corps of Engineers, U. S. Army of the St. Louis District, on October 15, 1956, and as detailed in the "Petition For Temporary Modification of Paragraph 3 of Decree of April 21, 1930," herein filed by the State of Illinois, in order to partly alleviate the critical situation, upon recommendation of the Division Engineer, Great Lakes Division at Chicago, Corps of Engineers, U. S. Army, The Metropolitan Sanitary District of Greater Chicago increased the authorized diversion of water from Lake Michigan at Chicago on October 23, 1956, for a period of ten (10) days by 1,900 c.f.s. This was the maximum increase that could be permitted by the Sanitary District if the annual average diversion for 1956 would be contained within the amount allowed for diversion by the decree of the Supreme Court of April 21, 1930 and the permit of the Secretary of War of June 26, 1930.

NEED AND AUTHORITY FOR INCREASED DIVERSION.

The Court will undoubtably take judicial notice of the prolonged drought in the mid-west area and the critical condition on these waterways as a result thereof. The Secretary of the Army, through its Corps of Engineers is likewise fully aware of these critical conditions requiring immediate action if the emergency is to be eased in any reasonable way. The only practicable relief available, if these inland waterways are to function, is by the clarifica-

tion of the decree of April 21, 1930, and the immediate authorization of a temporary increase in diversion from Lake Michigan for *navigation purposes* by the *Congress* acting upon recommendation of the Corps of Engineers, as authorized by existing Statutes.

WHEREFORE, THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO respectfully moves this Court to clarify its Decree in this cause, of April 21, 1930, so as to:

(1) Reiterate recognition of the authority and right of the Congress, in the interest of navigation, to authorize a diversion of water from Lake Michigan at Chicago:

(2) That the Congress may properly vest the determination as to such diversion, for navigation purposes, in the Secretary of the Army, upon recommendation of its Chief of Engineers;

(3) That, in the specific instance, the Congress acting upon the recommendation of its proper deputed agencies, in the interest of navigation, may authorize that the diversion of water at Chicago from Lake Michigan be increased from the present authorized 1,500 c.f.s. to a total of 10,000 c.f.s., in addition to domestic pumpage, for a period of 100 days or for such other period of time as may be required to ameliorate the present serious navigation conditions existing in the Illinois Waterway and the Mississippi River.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO respectfully further requests that its Motion herein may stand as its Answer to the Petition of the State of Illinois for Temporary Modification of Paragraph 3 of the decree of April 21, 1930, in Original Causes Nos. 2, 3 and 4, as ordered to be filed by this Court on November 17, 1956.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO further respectfully requests that

consideration of this Motion be made simultaneously with the Hearing on the Petition of the State of Illinois, heretofore filed, and the Answers thereto as may be filed by the other parties to these Original Causes.

Respectfully submitted,

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,
By: RUSSELL W. ROOT,
Attorney.

STATE OF ILLINOIS }
COUNTY OF COOK } SS

The undersigned, Lawrence J. Fenlon, being first duly sworn, deposes and says that he is a duly appointed and acting Principal Assistant Attorney of The Metropolitan Sanitary District of Greater Chicago; and that the matters and things herein set forth are true in substance and in fact. Deponent further certifies that copies of the foregoing Motion and Answer have this day been mailed by first class United States mail, or United States airmail, to all parties to this proceeding, such service has been addressed, sufficient postage prepaid, as follows:

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.....

Subscribed and sworn to before me this ..... day of November, A. D. 1956.

.....
Notary Public

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